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Constitutional Law -- Public Utilities State Action -- Jackson v. Metropolitan Edison Co.

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shall, like *Erie*, will have these same desirable effects. Finally, even though *Marshall* appears to be inconsistent with some of the language in *Hanna*, it would seem to be the proper interpretation in light of *Hanna's* reaffirmation of the holding in *Erie*, that federal courts must apply state substantive law.[125] Thus, since application of the *Marshall* rule is consistent with *Erie* and promotes federalism, it is submitted that the Supreme Court should adopt the *Marshall* rule for the resolution of Federal Rule-state law conflicts.

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Constitutional Law—Public Utilities—State Action—*Jackson v. Metropolitan Edison Co.* [1]—Petitioner Catherine Jackson was a residential customer of respondent Metropolitan Edison Company (Metropolitan),[2] receiving electric service at her home in York, Pennsylvania under an account in her name. Metropolitan terminated Jackson's account in September 1970 because of an asserted delinquency in payments;[3] however, service to the residence was restored under a new account in the name of a cooccupant, James Dodson. Dodson left the residence in August 1971, and while electrical power continued to be provided after his departure, no subsequent payments were made for this service.[4] On October 6, 1971, two employees of Metropolitan visited the Jackson home in an unsuccessful attempt to locate Dodson and collect the arrearages. Another employee arrived on the following day, and upon investigation, informed Jackson that the meter had been tampered with so as to prevent registration of the electricity consumed.[5] Disclaiming any knowledge of this situation, Jackson attempted to have electrical

[125] 380 U.S. at 465, 471.

[1] — U.S. —, 95 S. Ct. 449 (1974).

[2] Metropolitan Edison is a "privately owned and operated" utility holding a certificate of public convenience issued by the Pennsylvania Public Utilities Commission (Pa. Pub. Util. Comm'n). Metropolitan is the sole distributor of electric power to a service area that includes York, Pa. 95 S. Ct. at 451, 459.

[3] The termination of service in September 1970 was not directly in issue in *Jackson*, however, a reading of the lower court opinions in this case suggests that Metropolitan's record of the outstanding balance was a factor in the subsequent termination of service in October 1971. See Jackson v. Metropolitan Edison Co., 483 F.2d 754, 755-56 (3d Cir. 1973); Jackson v. Metropolitan Edison Co., 348 F. Supp. 954, 955-56 (M.D. Pa. 1972).

[4] 95 S. Ct. at 451.

[5] Id. at 452. Although Metropolitan's tariff provided the right to discontinue service for "fraud or tampering" with the meter, the company did not choose to assert this ground as a basis for the termination. Id. at 451 n.1. See note 7 infra. Furthermore, the certificate of public convenience conferred upon Metropolitan certain rights of eminent domain, Pa. Stat. Ann. tit., 66, § 1124 (Supp. 1974), as well as the right of entry to a customer's property for maintenance and inspection of equipment. Pa. Pub. Util. Comm'n Elec. Reg., Rule 14D [hereinafter cited as Rule 14D], cited in *Jackson*, 95 S. Ct. at 462 n.1. See notes 32, 33, 47 infra.

service reinstated, this time under the name of Robert Jackson, later identified as her twelve-year-old son.[6]

Without further notice, Metropolitan discontinued electrical service to the Jackson residence four days later.[7] In response, Jackson instituted suit against Metropolitan in the United States District Court for the Middle District of Pennsylvania,[8] seeking compensation for damages, and an injunction to restrain the termination of service until she had been afforded notice, a hearing, and the opportunity to pay any outstanding balance found due.[9] Basing her suit upon the Civil Rights Act of 1871 (hereinafter section 1983),[10] Jackson claimed that a state-regulated public utility, acting under color of state law, had deprived her of a protected property interest[11] in violation of the Due Process Clause of the Fourteenth Amendment.[12] The district court granted Metropolitan's motion to dismiss, holding that the termination of service by Metropolitan was not reviewable under the Fourteenth Amendment, because the state

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[6] 95 S. Ct. at 452.

[7] Metropolitan discontinued electric power "by disconnecting the line on the company's utility pole on the street near the plaintiff's house." 483 F.2d at 755. Presumably, Metropolitan contended that its right to discontinue Jackson's service was derived from Rule 15 of Tariff No. 41, which reads in part:

> Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill or violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations; or, without notice, for abuse, fraud, or tampering with the connections, meters or other equipment of Company. Failure by Company to exercise this right shall not be deemed a waiver thereof.

Met. Edison Co. Elec. Tariff, Elec. Pa. Pub. Util. Comm'n, No. 41, Rule 15 [hereinafter cited at Rule 15], quoted in *Jackson*, 95 S. Ct. at 451.

[8] Jackson v. Metropolitan Edison Co., 348 F. Supp. 954 (M.D. Pa. 1972).

[9] 95 S. Ct. at 452. It appears that Jackson made tenders of partial payment of arrearages to Metropolitan, but that the company did not accept her compromise. 348 F. Supp. at 956.

[10] Act of April 20, 1871, Ch. 22, § 1, 17 Stat. 13, now codified in 42 U.S.C. § 1983 (1970). To prosecute a claim successfully under § 1983, a plaintiff must show: (1) that the defendant has deprived him of a federally protected right (an "entitlement"); and (2) that the action was under color of law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). The requirement that the defendant must have acted under color of law is treated by the courts as the functional equivalent of the state action test under the Fourteenth Amendment. See, e.g., United States v. Price, 383 U.S. 787, 794 n.7 (1966). But cf. *Adickes*, supra at 211 (Brennan, J., concurring and dissenting).

[11] In her brief, petitioner apparently relied upon such cases as Fuentes v. Shevin, 407 U.S. 67 (1971), Bell v. Burson, 402 U.S. 535 (1971), and Goldberg v. Kelly, 397 U.S. 254 (1970), in an effort to establish that her right to receive utility service was tantamount to a constitutional right or "entitlement" from the state. 483 F.2d at 761. The Supreme Court never reached this issue because of its conclusion on the threshold question of state action. 95 S. Ct. at 452 n.2, 457. However the Third Circuit briefly addressed Jackson's claim of entitlement. Distinguishing the above cited cases, the court concluded that "[t]he 'entitlement' cases generally deal with a privilege or right conferred by the state of something which it alone can grant . . . . We do not believe that there is a property right to be furnished utility services without payment." 483 F.2d at 761 n.14. But see 95 S. Ct. at 460 (Douglas, J., dissenting).

[12] The Fourteenth Amendment provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law . . . ." U.S. Const. amend. XIV, § 1.

was not sufficiently involved in the challenged activity to warrant a finding of state action.[13] The United States Court of Appeals for the Third Circuit affirmed the dismissal of the complaint on the ground that the state's involvement was de minimus under the applicable state action test.[14]

On certiorari to the United States Supreme Court,[15] in an opinion by Justice Rehnquist, the Supreme Court HELD: a state is not sufficiently connected with the termination of electrical service to attribute that conduct to the state under the Fourteenth Amendment, where it is shown only that the public utility is heavily regulated, enjoys a partial monopoly within its service area, and elects to terminate service in a manner that the state public utilities commission found permissible under state law.[16]

The Supreme Court's conclusion that state involvement in Metropolitan's termination of service to Jackson was insufficient to warrant a finding of state action is noteworthy for a number of reasons. In a practical sense, the effect of the *Jackson* decision is to preclude the federal judiciary from entertaining due process claims of customers of public utilities unless the plaintiff can show a greater degree of state involvement in the challenged activity than was demonstrated in the instant case. Moreover, from an analytic standpoint, the *Jackson* opinion has broader implications; it portends new developments in the Fourteenth Amendment state action analysis. The importance of the decision should be assessed in light of the *type of inquiry* conducted, as well as the Court's markedly different approach to the *sufficiency test* by which state action will be determined in a given situation. The emerging attitude of a present majority of the Court appears to be a more restrictive approach to the question of the nature and sufficiency of state involvement necessary to constitute state action. It would seem that the effect of the majority view is to prescribe that the nexus between the state and the challenged activity must be closer than has been necessary in the past. Although the broadest effects of this adjustment will not become fully apparent until the *Jackson* approach is applied by the Court in future cases,[17] it is not unreasonable to conclude that the *Jackson* opinion limits the reach of the state action doctrine and, consequently, the jurisdiction of the federal courts.

Beginning with the Court's opinion in *Jackson,* the indices of state involvement identified by the petitioner, in support of her

[13] 348 F. Supp. at 955, 958.

[14] 483 F.2d at 762. Although the court of appeals noted that "plaintiff's position has strong appeal," it agreed with the district court's application of a narrow view of the color of state law test. The Third Circuit found "no overriding justification for utilization of the Civil Rights Act to intrude the federal courts into what is and should remain a state regulatory process." Id. at 762.

[15] 415 U.S. 912 (1974).

[16] 95 S. Ct. at 457. Justices Douglas, Brennan and Marshall filed separate dissenting opinions.

[17] See note 113 infra.

contention that there was sufficient state action to invoke the jurisdiction of the federal courts will be considered briefly. Next, the emerging state action analysis contained in the six-Justice majority opinion in *Jackson* will be discussed in terms of the type of inquiry which is now required to be conducted and the amount of state involvement necessary to support a finding of state action. It will be submitted that by adhering to a narrow view of the state action test in *Jackson,* the Court reached an incorrect result on the facts of this case. It will be further suggested that the application of this strict test is directly attributable to the desires of the present majority of the Court to afford the conduct of "private" individuals a greater degree of immunity from the review of the federal courts under the Fourteenth Amendment.

I. THE STATE AND THE UTILITY: ASPECTS OF STATE INVOLVEMENT IN *Jackson*

Whether public utilities are required by the Due Process Clause of the Fourteenth Amendment to afford their customers notice and a hearing prior to a termination of service is an issue that has been the source of much recent litigation[18] and commentary.[19] Utility customers, such as Jackson, have challenged summary termination procedures under the Fourteenth Amendment by instituting suit in federal court under section 1983,[20] for violation of their civil rights. The threshold issue in this litigation is whether state involvement in

[18] Prior to *Jackson*, courts were split on the state action-due process issue regarding the conduct of public utilities. See, e.g., Palmer v. Columbia Gas, Inc., 479 F.2d 153 (6th Cir. 1973), modified, Turner v. Impala Motors, 503 F.2d 607 (1974) (state action present, but analysis limited to public utility area); Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972), cert. denied, 409 U.S. 1114 (1973) (no state action); Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), vacated as moot, 409 U.S. 815 (1972) (state action present); Particular Cleaners, Inc. v. Commonwealth Edison Co., 457 F.2d 189 (7th Cir.), cert. denied, 409 U.S. 890 (1972) (no state action); Martin v. Pacific Nw. Bell Tel. Co., 441 F.2d 116 (9th Cir. 1971) (no state action); Kaldec v. Illinois Bell Tel. Co., 407 F.2d 624 (7th Cir.), cert. denied, 396 U.S. 846 (1969) (no state action). See also Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972) (state action present); Hattel v. Public Serv. Co., 350 F. Supp. 240 (D. Colo. 1972) (state action present); Stanford v. Gas Serv. Co., 346 F. Supp. 717 (D. Kan. 1972) (state action present); Lamb v. Hamblin, 57 F.R.D. 58 (D. Minn. 1972) (state action present); Morgan v. Kennedy, 331 F. Supp. 861, (D. Neb. 1971) (state action present); Davis v. Weir, 328 F. Supp. 317 (N.D. Ga. 1971) (state action present); Sokol v. Public Util. Comm'n, 65 Cal. 2d 247, 418 P.2d 265, 53 Cal. Rptr. 673 (1966) (state action present); Taglianetti v. New England Tel. & Tel. Co., 81 R.I. 351, 103 A.2d 67 (1954) (no state action).

[19] See, e.g., Haydock, Public Utilities and State Action: The Beginning of Constitutional Restraints, 49 Denver L.J. 413 (1973); Note, 14 B.C. Ind. & Comm. L. Rev. 317 (1972); Note, 22 Buff. L. Rev. 1057 (1973); Comment, 74 Colum. L. Rev. 656 (1974); Comment, 62 Colum. L. Rev. 312 (1962); Note, 6 Creighton L. Rev. 417 (1973); Note, 86 Harv. L. Rev. 1477 (1973); Note, 58 Iowa L. Rev. 1161 (1973); Comment, 39 Mo. L. Rev. 205 (1974); Note, 48 N.Y.U.L. Rev. 493 (1973); Comment, 34 Ohio St. L.J. 222 (1973); Comment, 24 U. Fla. L. Rev. 744 (1972); Note, 27 U. Miami L. Rev. 529 (1973); Comment, 60 Va. L. Rev. 840 (1974); Note, 46 Wash. L. Rev. 745 (1971); Note, 76 West Va. L. Rev. 492 (1974).

[20] 42 U.S.C. § 1983 (1970).

the challenged action has been sufficient to support a finding of state action; this issue arises from the Fourteenth Amendment requirement that no state shall deprive any person of life, liberty, or property without due process of law. The Supreme Court first took cognizance of the limited scope of this Amendment when, in its seminal decision in *The Civil Rights Cases*,[21] the Fourteenth Amendment proscriptions were held to be applicable only to state action, and not to the action of private individuals.[22] In recent years, however, litigants in the federal courts have argued for an expansion of the scope of the state action doctrine in their efforts to bring certain activities, previously assumed to be purely private in nature, within the purview of the Due Process Clause of the Fourteenth Amendment.[23] Similarly, the petitioner in *Jackson* sought to obtain from the Court a broader and more-inclusive definition of state action.

The appellant in *Jackson* apparently based her claim of state action upon an identification of six aspects of state involvement in Metropolitan's termination procedures.[24] The Court addressed each of these issues in sequence, and concluded it was unpersuaded by Jackson's argument.[25] Jackson attempted to persuade the Court that extensive state regulation of the utility was evidence of state action.[26] Relying upon *Moose Lodge No. 107 v. Irvis*,[27] and *Public*

[21] 109 U.S. 3 (1883).

[22] In the Civil Rights Cases, the Court sustained a broad constitutional challenge to the authority of Congress to enact §§ 1 & 2 of the Civil Rights Act of 1871, which attempted to regulate private conduct. 109 U.S. at 13. The Court reasoned:

> And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceedings under said legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.

109 U.S. at 13. It is important to note that in drawing the distinction between the proscribable acts of the state and those individual activities immune from the limitations of the Fourteenth Amendment in The Civil Rights Cases, the Court intimated a willingness to dissolve this wall of immunity if the acts of the private individual were "sanctioned in some way by the State, or . . . done under State authority . . . ." Id. at 17. See notes 88-98 infra and accompanying text.

The case most often cited as supporting the continued viability of this public-private distinction is Shelley v. Kraemer, 334 U.S. 1 (1948), cited by the Court in *Jackson*, 95 S. Ct. at 453, *Shelley* is discussed at note 99 and text at notes 105-09 infra.

[23] See, e.g., Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), cert. denied, — U.S. —, 95 S. Ct. 325 (1974) (self-help repossession under Uniform Commercial Code § 9-503); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (freedom of speech challenge against shopping center); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) (due process challenge to private school receiving aid).

[24] For extensive consideration of the aspects of state inolvement in public utilities on a national scale, see Note, 86 Harv. L. Rev. 1477 (1973). See also Note 14 B.C. Ind. & Com. L. Rev. 317 (1972); Comment, 74 Colum. L. Rev. 656 (1974); Comment, 60 Va. L. Rev. 840 (1974); authorities cited at note 19 supra.

[25] 95 S. Ct. at 454.

[26] Id. at 453.

[27] 407 U.S. 163 (1972). *Moose Lodge* involved a suit by a Negro who, while a guest of

Utilities Commission v. Pollak,[28] a majority of the Court in *Jackson* concluded that state regulation of a privately owned and operated public utility would not, by itself, warrant bringing the actions of the utility within the ambit of the Fourteenth Amendment.[29] The Court reached this decision even though the state regulation was detailed and resulted in a type of state-protected monopoly.[30] Mindful of its conclusion that there must be more involvement of the state than mere regulation of the utility, the Court framed the ensuing state action test as "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[31] In terms of its over-all analysis, it is significant that the Court apparently treated the aspect of state regulation as an underlying condition, albeit insignificant in and of itself, upon which other aspects of state involvement could be superimposed to justify a finding of state action.[32] In the context of this analysis, however, the fact that the relationship between the state and the

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one of its members, had been denied service in the private club solely because of his race. The basis for complainant's Equal Protection claim was that the state's issuance of a private club liquor license had amounted to an involvement in the club's discriminatory practice sufficient to constitute state action. The Supreme Court rejected this argument. The Court stressed the fact that the state in no way fostered or encouraged the racial discrimination and furthermore, that the discrimination originated solely in private individuals. Id. at 171-77.

[28] 343 U.S. 451 (1952). A regulated street railway company in the District of Columbia had established a policy of receiving and amplifying radio programs in its streetcars and buses. Responding to passengers' complaints, the public utilities commission conducted an investigation and held a hearing, after which it concluded that the radio service enhanced the public service. The commission thus permitted the practice to continue. A number of passengers then instituted suit against the commission, claiming a violation of First and Fourteenth Amendment rights. Id. at 453-60. While reasoning that the action of the commission amounted to an "authorization and approval" of the challenged practice sufficient to constitute "federal action" under the Fifth Amendment, the Court concluded on the merits of the case that there was no First or Fourteenth Amendment violation. Id. at 463-66. The court in *Pollak* did not rely upon the aspect of monopoly status. Id. at 462. Compare the discussion of *Pollak* in the *Jackson* opinion, 95 S. Ct. at 456-57 with Justice Marshall's dissent, id. at 463 n3. See also notes 37, 40-41 & accompanying text infra.

[29] 95 S. Ct. at 453-54. From a practical view, a regulatory scheme is the converse of a supportive involvement of the state, insofar as it restricts the otherwise free exercise of private enterprise. Without the addition of a more positive form of state encouragement favoring the performance of a particular activity, it would be unfair, in due process terms, to treat the acts of a regulated entity to be those of the state for the purposes of the Fourteenth Amendment. See Note, 74 Colum. L. Rev. 656, 685-90 (1974). But cf. Note, 48 N.Y.U.L. Rev. 493, 497-506 (1973).

[30] 95 S. Ct. at 453.

[31] Id.

[32] As a part of its regulatory scheme, the State of Pennsylvania granted Metropolitan specific powers: limited rights of eminent domain and rights of entry upon customers' property for purposes of inspection and maintenance of equipment. See note 5 supra. Arguably, this grant of power could constitute a sufficient state involvement in Metropolitan's procedures to warrant a finding of state action if Metropolitan had actually exercised one of these powers in terminating Jackson's service. See 95 S. Ct. at 454; note 47 infra. But see 95 S. Ct. at 457 (Douglas, J., dissenting); id. at 461 (Marshall, J., dissenting).

entity must reach to the *specific activity* being challenged, will likely preclude a finding of state action on the basis of regulation.[33]

Jackson next proposed that the state's conferral of monopoly status upon Metropolitan indicated the presence of state action.[34] Although questioning whether the state had, in fact, granted or guaranteed Metropolitan a monopoly, the majority assumed that the state had granted the utility that priviledged status.[35] However, the Court concluded that conferral of this status would not, in and of itself, be determinative of the state action question.[36] The fundamental and dispositive issue was deemed to be the existence of a sufficiently close relationship between the monopoly status and the specific action challenged. The Court again relied upon *Pollak* to reaffirm its "expressly disclaimed reliance" on the factor of monopoly status,[37] and upon *Moose Lodge,* to exemplify a situation where certain monopoly aspects were present, but the state's involvement was nevertheless deemed insufficient.[38] The majority concluded that, "[i]n each of those cases, there was insufficient relationship between the challenged actions of the entities involved and their monopoly status. There is no indication of any greater connection here."[39] Both Justices Douglas[40] and Mar-

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[33] Judge Friendly, in the case of Powe v. Miles, 407 F.2d 73 (2d Cir. 1968), stated: "[T]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff, but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of the complaint." Id. at 81. On the facts presented in *Jackson,* it would seem clear that this grant of eminent domain and/or right of entry would be of no relevance in this test if the specific right had not been exercised in the termination of service by Metropolitan. Under this type of analysis, then, electric utilities would be well advised to refrain from using any such extraordinary powers, and restrict themselves to the simple and apparently quite effective technique of cutting off the service at the utility pole, as was done in *Jackson.* 483 F.2d at 755.

[34] 95 S. Ct. at 454.

[35] Id. at 454 n.8. The Court was apparently impressed by the absence of specific lanquage, in either the certificate of public convenience or the Pennsylvania statutes, indicating that Metropolitan was the receipient of a grant or guarantee of monopoly. It noted that Metropolitan faces competition "within portions of its service area," and it emphasized further that a public utility is a "natural monopoly" created by market forces. Id.

[36] Id. at 454.

[37] Id. This "disclaimer" would appear to have been read far too literally since the context of the quotation intimates quite clearly that monopoly status was not deemed irrelevant in *Pollak,* but merely that the commission's approval of the challenged conduct was a far more significant involvement. See *Pollak,* 343 U.S. at 462. See also note 28 supra & notes 40-41 infra.

[38] 95 S. Ct. at 454. The monopoly factor was considered in *Moose Lodge,* but the Court found that the grant of a liquor license "fell short" of conferring monopoly status upon the private club. 407 U.S. at 177.

[39] 95 S. Ct. at 454.

[40] Id. at 457-60 (Douglas, J., dissenting). Particularly noteworthy is Justice Douglas's comment upon the Court's interpretation of *Pollak:* "Our disclaimer of reliance upon this factor in [*Pollak*] should not be read as holding that monopoly status is wholly irrelevant; the 'disclaimer' on its face simply states that monopoly status was not used as an ingredient of the finding of federal governmental involvement in that case." Id. at 458 n.4. Justice Douglas would treat monopoly status as "highly relevant" in assessing the "aggregate weight" of state involvement. Id. at 458.

shall[41] disagreed with the majority's position on the ground that the Court not only disregarded prior cases, but misconstrued *Pollak* so as practically to eliminate monopoly status as a factor to be considered in weighing state contacts with the challenged activity.

It was further contended by Jackson that by providing an essential public service in the distribution of electrical power, Metropolitan performed a "public function," and thus should be subject to the constraints of the Fourteenth Amendment.[42] Recognizing that it had "of course found state action present in the exercise by private entity (sic) of powers traditionally exclusively reserved to the State,"[43] the Court nonetheless concluded that Metropolitan's termination of service did not fall within this category.[44] "While the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State."[45] As

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[41] Id. at 461-65 (Marshall, J., dissenting). Justice Marshall also disagreed with the Court's treatment of this issue of monopoly status. He complained that the Court's approach failed to recognize "the State's policy of utilizing private monopolies to provide electric service," and ensuring, through regulation and cooperation, that "the company's service will be the functional equivalent of service provided by the State." Id. at 461-62. See generally Comment, 74 Colum. L. Rev. 656 (1974); Note, 86 Harv. L. Rev. 1477 (1973).

[42] 95 S. Ct. at 454.

[43] Id.

[44] Id. In the *Jackson* opinion, the term "public function" would seem to have been equated—or at least used interchangeably—with "municipal duty," "state obligation," "power traditionally associated with sovereignty," and a service that is "traditionally the exclusive prerogative of the State." Id. The Court concluded nonetheless, that Metropolitan's act of termination did not fit under any of these terms. Somewhat revealing, in this regard, is the analysis set forth in the majority opinion in *Moose Lodge*, which also was written by Justice Rehnquist:

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatsoever. Since state-furnished services include such necessities of life as electricty, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in the Civil Rights Cases . . . .

407 U.S. at 173. It would appear, then, that the Court in *Jackson* was more interested in whether the state could be *compelled* to provide the service, rather than whether the function is characteristically performed, directly or indirectly, by the state.

If, as Justice Marshall suggests in *Jackson*, the state has an identifiable policy of utilizing private monopolies to provide utility service, 95 S. Ct. at 462 (Marshall, J., dissenting), this arrangement could be treated as an implied agency for the purposes of the state action doctrine. Under such an approach, the statutory obligation imposed upon the utility to provide service would be imputed to the state, and the acts of the utility would be deemed ratified by the state because of: (1) its acceptance of the benefits therefrom; and (2) its approval of the practice through the state public utilities commission's procedures. See Comment, 74 Colum. L. Rev. 656, 680-85 (1974). Cf. Bowman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960), discussed at note 69 infra.

[45] 95 S. Ct. at 454. Pa. Stat. Ann. tit. 66, § 1171 (1937), provides: "Every public utility shall furnish and maintain adequate, efficient, safe and reasonable services and facilities . . . . Such service also shall be reasonably continuous and without unreasonable interruptions or delay." Justice Brennan would read this provision as limited by § 25 of the General Rules and Regulations, Electrical Service Tariff, to "customers." 95 S. Ct. at 460 (Brennan, J., dissenting). As it was his view that Jackson ceased to be a customer in September 1970, Justice

supplying utility services was not found to be "traditionally the prerogative of the State" under Pennsylvania law,[46] the majority decided that Metropolitan did not perform a public function.[47]

The Court also rejected Jackson's contention that Metropolitan was "affected with the public interest," and that its act of terminating service should consequently be considered state action.[48] The majority declined to expand this doctrine, which had been confined to a "limited line of cases," for reasons that were stated in its prior decision in *Nebbia v. New York*.[49] The Court in *Jackson* reasoned

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Brennan would have ordered the complaint dismissed since there was no basis for finding an entitlement and a deprivation thereof. Id.

[46] 95 S. Ct. at 454. In support of this conclusion, the Court cited two Pennsylvania cases, and stated that "[t]he Pennsylvania courts have rejected the contention that the furnishing of utility services are either state functions or municipal duties." Id., citing Baily v. Philadelphia, 184 Pa. 594, 602, 39 A. 494, 495 (1898); Girard Life Ins. Co. v. Philadelphia, 88 Pa. 393 (1879). However, these cases support the Court's assertion that Pennsylvania did not view the furnishing of utility service as a "state function", only to the extent that the term is defined as an enforceable obligation. See note 44 supra. It is submitted that a better reading of these cases is that utility service was considered a characteristic activity of the state, whereby it could furnish the service itself, while operating in the form of a municipal corporation, or it could choose to delegate the authority to a private corporation, while asserting regulatory authority to insure fair and adequate public service. See *Bailey*, 184 Pa. at 602-04, 39 A. at 495; *Girard*, 88 Pa. at 394 (by implication).

[47] 95 S. Ct. at 454-55. The Court noted that "[i]f we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one." Id. Metropolitan is granted such a right by statute. Id. at 462 n.1 (Marshall, J., dissenting). However, this power was not exercised by Metropolitan in this particular termination. See notes 5, 32, 33 supra. This aspect of the Court's opinion indicates a concern less with the result achieved, *i.e.*, discontinuance of electric service, than with the means employed by the company to achieve the termination. This analysis deemphasizes the importance of the fact of termination itself, focusing instead upon the potential for other violations incurred during the attempt to effect the termination, such as trespass. Query whether the Court would similarly characterize the right of entry granted Metropolitan as a power traditionally associated with sovereignty, thus presenting a "different case".

[48] 95 S. Ct. at 455.

[49] 291 U.S. 502 (1934). Appearing in the *Jackson* opinion is a passage from *Nebbia* to the effect that "[e]xpressions 'affected with a public interest' and 'clothed with a public use' . . . are not susceptible to definition and form an unsatifactory test." 95 S. Ct. at 455, quoting from *Nebbia*, 291 U.S. at 536. Although this quotation supports the Court's proposition that the status, "affected with the public interest," provides an insufficient single factor test, it is submitted that in the context of *Jackson*, *Nebbia* is actually inapposite to the relevant question of whether this status is a factor of state involvement that can properly be considered under a state action analysis.

Presented in *Nebbia* was a substantive due process attack upon the constitutionality of a New York statute that sought to prevent price-cutting in the milk industry by regulating the price at which storekeepers could purchase from milk dealers. One of petitioner's arguments in *Nebbia* was that the category of businesses affected with the public interest referred to a closed class of enterprises that could be regulated by the state, a class that did not include the milk industry. 291 U.S. at 532. Had the Court in *Nebbia* defined "public interest" narrowly, and thus excluded the milk industry from the scope of proper state regulation under its police powers, the Court would have effectively delimited the powers of the state to regulate matters of local concern. The Court chose to view the expression "affected with a public interest" as an inartful phrase, "not susceptible of definition . . . [forming] an unsatisfactory test of the constitutionality of legislation directed at business practices or prices." Id. at 536. It stated

that regulated businesses, which characteristically provide essential public services and are thus affected with a public interest, should not by that status alone have their every action attributed to the state for the purposes of the Fourteenth Amendment.[50]

Two additional factors were presented by the petitioner to indicate the nature and extent of the state's involvement in Metropolitan's termination procedures; each was rejected by the Court. It was contended that the state's authorization and approval of Metropolitan's practice of summary discontinuance of electric service constituted state action.[51] The Court concluded, however, that there was no state action where the state had not placed its imprimatur on the termination practices by *ordering* that they be utilized, but merely permitted (and approved) that such activity may be performed at the initiative of a private party.[52] With regard to

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that there was no closed class of businesses affected with the public interest, and that "the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether the circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or "discriminatory." Id.

Unless the Court in *Jackson* has discarded the multi-dimensional state action analysis in favor of a single factor test, the reasoning employed in *Nebbia* is inapposite to the situation presented in *Jackson*. The determination of the *Nebbia* Court that "affected with the public interest" is an inappropriate single factor test in a review of the legitimacy of the state police power, would seem to have little bearing upon the type of state action analysis propounded in Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). To the contrary, it is submitted that a determination that a business is affected with the public interest is an important, if not indispensible consideration in the multi-faceted state action test. See 95 S. Ct. at 464-65 (Marshall, J., dissenting).

[50] 95 S. Ct. at 455. Once again, the Court failed to provide a rationale for its rejection of this factor as evidence of state action. Assuming that Metropolitan was affected with a public interest, the proper question would have been whether there was something more than that status sufficient to justify a finding of state action in the present case. Justice Douglas agreed "that doctors, lawyers, and grocers are not transformed into state actors simply because they provide arguably essential goods and services and are regulated by the State." Id. at 459 (Douglas, J., dissenting). However, he reasoned that "[i]n the present case . . . respondent is not just one person among many; it is the only public utility furnishing electric power to the town." Id.

[51] Id. at 455-57.

[52] See notes 99-104 infra & accompanying text. Under the *Jackson* Court's approach, there is no state action where a state merely permits, rather than orders, that an activity be performed. This type of analysis is similar to that employed by lower federal courts in disposing of procedural due process attacks upon "self-help repossession." Self-help repossession is a remedy available to secured parties, as provided under Uniform Commercial Code § 9-503, and, in most states, under prior-existing common law. The self-help remedy is usually deemed consensual in nature and is treated as an *available* procedure, rather than a process that is mandated upon debtor default. Since it is not the only remedy open to secured parties, courts have reasoned that there was insufficient encouragement by the state to activate the provisions of the Fourteenth Amendment. See, e.g., Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 330 (9th Cir.), cert. denied, 95 S. Ct. 325 (1974). However, these courts have failed to consider the variety of less direct encouragements to utilize the remedy. For example, consider that the increasing costs of proceeding to secure collateral by judicial process, as by a writ of replevin, make the speedy and inexpensive self-help remedy even more appealing. See North Ga. Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719 (1975); Mitchell v. W.T. Grant Co., 94 S. Ct. 1895 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972). Note also that the self-help remedy is impliedly written into every security agreement "unless

the final contention that Metropolitan and the state were joint participants and joint beneficiaries in the provision of utility service,[53] the Court concluded that the state could neither be deemed a partner nor a joint venturer in the enterprise, where all that had been shown was that the utility was privately owned but heavily regulated by the state, that Metropolitan was singularly responsible for the provision of service, and that it paid taxes to the state in common with other corporations.[54]

Despite these arguments, the *Jackson* Court found that there was an insufficient nexus between the state and the challenged practice of Metropolitan's termination of electrical service to warrant a finding of state action.[55] It appears that in reaching this conclusion, the Court failed to consider the *combined* effect of these various indicia, and thus fell short of attributing to these factors their true significance in the state action analysis. It is submitted that, had the Court truly engaged in its previously-approved process of "sifting facts and weighing circumstances,"[56] and had it assessed the *cumulative effect* of all the facets of state involvement in Metropolitan's termination procedures, it should have found that an identifiable nexus was present.[57] The Court's own sufficiency test seems to have been misapplied, since: (1) Metropolitan provided the only source of electrical power to persons in its service area;[58] (2) the state's licensing and regulatory schemes in conjunction with natural market forces protected Metropolitan's monopoly-like status to some degree;[59] and (3) due to the combination of all identified factors, the state's authorization of Metropolitan's exercise of its choice to terminate service by summary means amounted to a grant of a government-like power that was too apt to be used carelessly by the

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otherwise agreed," Uniform Commercial Code § 9-503, a fact attributed no importance by the courts. See generally *Adams*, 492 F.2d at 330.

[53] 95 S. Ct. at 457.

[54] Id. The Court sought to identify the type of "symbiotic relationship" that was present in Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). It concluded that the circumstances presented in *Jackson* fell short of this extensive relationship; in other words, the State of Pennsylvania had not so far insinuated itself into a position of interdependence with Metropolitan that it could be deemed a joint participant in the enterprise. 95 S. Ct. at 457. But consider Justice Marshall's statement that "[t]he pattern of cooperation between Metropolitan Edison and the State has led to significant state involvement in virtually every phase of the company's business." Id. at 462-63 (Marshall, J., dissenting). See also id. at 459-60 (Douglas, J., dissenting).

Note also that the Court failed to account for Pennsylvania's imposition of a special tax upon the gross receipts of public utilities. Pa. Stat. Ann. tit. 72 § 8101 (Supp. 1974). The interplay of monopoly status—or at least the insulation from competitive market forces—and this special tax upon gross receipts, would appear to be more of a mutually beneficial relationship than the Court was willing to admit.

[55] 95 S. Ct. at 457.

[56] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[57] See notes 70-87 infra & accompanying text.

[58] 95 S. Ct. at 459 (Douglas, J., dissenting).

[59] See 43 U.S.L.W. at 4115-16, 4117-18. See generally Comment, 74 Colum. L. Rev. 656, 663-72 (1974); Note, 86 Harv. L. Rev. 1477, 1487-91 (1973).

utility. To the extent that the majority remains unwilling to consider the actual effect and interrelationship between the full panoply of state involvement in the type of situation presented in *Jackson,* the Court thus prevents electric consumers from resorting to the federal courts for a review of their Due Process claims against the practice of summary termination of electrical service.[60]

II. The Emerging State Action Test

It appears that the *Jackson* opinion presents significant developments in the Fourteenth Amendment state action analysis. The approach taken by the majority of the Court in *Jackson* differs from that utilized in earlier cases in two respects: first, in terms of the type of inquiry conducted; and second, in terms of the sufficiency test by which the question of state involvement was determined. Although the opinion in *Jackson* fails to make any significant contribution to the development of a definitive constitutional standard,[61] an understanding of the nature of this departure hopefully will assist in predicting the course that the Court will follow in resolving state action issues.

A. *Type of Judicial Inquiry*

It would appear from the *Jackson* opinion, that the Court has decided that the state action issue is to be considered independent of the substantive question of whether the challenged action works a deprivation of a constitutionally protectible interest.[62] Under this approach, a determination is first made as to the presence or absence of state action for Fourteenth Amendment purposes; and then, only if state action is found, will the Court address the issues of the complainant's entitlement to protection of the interest and whether there has been a violation of that right.[63] Although this method of

[60] This note assumes that had there been state action in Metropolitan's termination procedures, Jackson would have been entitled, at the minimum, to notice and a right to an informal hearing before cessation of electric power. For suggested procedures that could be employed, see Note, 86 Harv. L. Rev. 1477, 1494 (1973).

[61] In the sense that the state action test still depends upon a careful analysis of the facts of each case presented, and given the realization that "[d]ifferences in circumstances beget appropriate differences in law," Whitney v. State Tax Comm'n, 309 U.S. 530, 542 (1940), *Jackson* does not present a guideline test. Although the workability of broad guideline opinions may be questioned as a general proposition, there remains a school of thought favoring the development of definitive constitutional standards in selected areas. See, e.g., North Ga. Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719 (1975), where Justice Blackmun was joined in his dissent by Justice Rehnquist in arguing that a due process standard for measuring the constitutional validity of creditor-debtor statutes is needed. Id. at 726-29 (dissenting opinion).

[62] 95 S. Ct. at 452 n.2, 457.

[63] See id. at 457. It is in this sense that in a suit brought under the Fourteenth Amendment, state action is often referred to as a "jurisdictional fact." Unless the complaining party can establish sufficient state involvement to warrant a finding of state action the federal judge must dismiss the action, on defendant's motion, for want of subject matter jurisdiction. The finding of state action is a condition precedent to the exercise of federal jurisdiction. Cf. Crowell v. Benson, 285 U.S. 22, 55 (1932). See also note 10 supra.

evaluating claims under the Fourteenth Amendment is established in the cases,[64] it has not been considered settled law that the state action question is determined without at least a cursory examination of the nature of the substantive right being asserted.[65]

By developing this strict approach, the *Jackson* Court has in effect prescribed that judicial consideration of the sufficiency of state involvement must take place in a vacuum. Seemingly, the fact that an individual may have been deprived of a protected interest because of the color of his skin would be of no relevance in the type of inquiry suggested in *Jackson*.[66] The appearance that the Court has rejected the notion that "different standards should apply . . . when different constitutional claims are presented,"[67] troubles Justice Marshall, who forebodes:

> Thus, the majority's analysis would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve. I cannot believe that this Court would hold that the State's involvement with the utility company was not sufficient to impose upon the company an obligation to meet the constitutional mandate of non-discrimination. Yet nothing in the analysis of the majority suggests otherwise.[68]

The application of an invariable standard precludes any balancing of competing interests. This type of inquiry requires that the same quantum of state involvement must be present in the challenged activity no matter how invidious the deprivation. Unless the Court

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[64] See, e.g., Adicks. S.H. Kress & Co., 398 U.S. 144 (1970).

[65] See, e.g., id. at 190-91 (Brennan, J., concurring and dissenting). A state action analysis that attempts to discern the *same quantum* of state involvement without any consideration of the nature of the constitutional claim raises some difficulty in terms of recent Supreme Court decisions. See, e.g., Norwood v. Harrison, 413 U.S. 455, 468-71 (1973); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 114-21 (1973). Compare Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968), with Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). At least two commentators have suggested that in the state action area, the Court has engaged in a balancing of the constitutional rights of complaining parties with the need for certain types of governmental regulation. See Comment, 74 Colum. L. Rev. 656, 658-59 (1974); Comment, 60 Va. L. Rev. 840, 841-42 (1974).

[66] See 95 S. Ct. at 465 (Marshall, J., dissenting). This would certainly prove to be a remarkable turn of events, given the belief of commentators that, for all practical purposes, the state action requirement in the Equal Protection area had met its demise. See Note, 74 Colum. L. Rev. 656, 657 (1974). See also Black, The Supreme Court 1966 Term, Forward: "State Action," Equal Protection and California's Proposition 14, 81 Harv. L. Rev. 69, 100-03 (1967); Horowitz, The Misleading Search for "State Action" Under the Fourteenth Amendment, 30 S. Cal. L. Rev. 208, 209 (1957); Karst & Horowitz, A Telophase of Substantive Equal Protection, 1967 Sup. Ct. Rev. 39, 55-58 (1967); Williams, The Twilight of State Action, 41 Texas L. Rev. 347, 378 (1963).

[67] 95 S. Ct. at 465 (Marshall, J., dissenting). Justice Brennan would apparently agree with Justice Marshall's belief that a lesser quantum of state involvement will suffice in actions where racial discrimination is alleged. See *Adickes*, 398 U.S. at 190-91 (1970).

[68] 95 S. Ct. at 465 (Marshall, J., dissenting).

is prepared to modify this inflexible approach when reviewing Equal Protection instead of Due Process claims, Justice Marshall's criticism of the majority opinion in *Jackson* would seem to be justified—at least in those areas where the impetus to act is derived from "private" racial prejudices.[69]

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[69] Recent cases would seem, at least, to foreshadow Justice Marshall's ominous predictions. See, e.g., Evans v. Abney, 396 U.S. 435 (1970), discussed in note 99 infra, where the actual result of Supreme Court action was to give effect to a racially motivated condition in testator's will; the Court viewed the discrimination as having been interjected by a private party rather than the state. See also Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), discussed in note 27 supra, where the Court found the state insufficiently involved in the private club's racially restrictive membership or guest policies, particularly since the impetus to discriminate was from private individuals and not the state. But see Evans v. Newton, 382 U.S. 296 (1966), discussed in note 99 infra; cf. Shelley v. Kraemer, 334 U.S. 1 (1948), also discussed in note 99 infra. See also notes 105-09 and accompanying text.

The case of Bowman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960), may be the type of situation that Justice Marshall had in mind when he noted dissatisfaction with the majority's new approach to the state action test, especially since he served as co-counsel for the appellants in *Bowman*. It is appropriate to consider just how this racial discrimination case might fare under the Court's strict test. The same day the City of Birmingham repealed a provision of its code that required the racial segregation of patrons on buses operating within city limits, the city commission enacted a new ordinance, which provided: (1) that carriers of passengers for hire were authorized to promulgate seating regulations that were "reasonably necessary" and (2) that failure to obey the "reasonable request" of an operator would constitute a breach of the peace. The bus company made no change in its policy of segregated seating. A few days later, nine out of a group of 25 Blacks, all of whom had refused to obey the order of the driver to move to the rear, were arrested for breach of the peace. Id. at 532-33. Although the trial court held that the arrests were illegal in that the Blacks had been deprived of their civil rights, the court found that police officers had acted on their own accord, and not at the express behest of the bus company or their superior officers. The class action that had been brought, seeking to enjoin the company from enforcing its published rules requiring racial segregation, was thus dismissed. Id. at 533-34.

On appeal to the Fifth Circuit, the case was reversed and remanded, wherein it was held that the bus company had become an agent of the state in its actions of promulgating and enforcing rules that were racially discriminatory. Id. at 535-36. The court relied upon Shelley v. Kraemer, 334 U.S. 1 (1948), emphasizing that the city had granted a franchise to this privately owned, public utility that, in its terms, performed a public function. 280 F.2d at 535-36. Appellants had "failed in their proof to show joint or agreed action between the appellee and the City Commissioners, [and thus] lost the opportunity to argue that the Bus Company's action was, *for that reason*, state action." Id. at 534.

In the aftermath of *Jackson*, it is difficult to predict in just what manner the Court would deal with the type of situation presented in *Bowman*. From a result-oriented perspective, it would seem quite inconceiveable that the Court could let these rights remain unvindicated in an instance of such obvious cooperation between the city and the bus company in achieving the discriminatory result. The line of analysis that would be employed to justify this federal intervention is, however, not so predictable, especially in light of the failure of appellants to show joint action between the city and the company. Query whether the Court's analysis would be any different if the bus company was endowed with a power to control the seating patterns of its patrons that derived from the common law, a right that had been in effect for more than a century prior to the cause of action.

Consider that in litigation attacking the constitutionality of self-help repossession as violative of procedural due process, courts have typically held that there was no state action in the enactment of Uniform Commercial Code § 9-503, because this was a mere codification of a common law right. See, e.g., Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 330 (9th Cir.), cert denied, 95 S. Ct. 325 (1974). The *Jackson* court has noted in passing, and without discussion, that Metropolitan had a common law right to terminate service for

B. *Sufficiency Test*

A review of state action cases,[70] including *Jackson,* reveals that there is no "litmus test"[71] to measure, for the purposes of the Fourteenth Amendment, the sufficiency of state involvement in a particular factual situation. A precise formula has never been devised to resolve the difficulty involved in making this threshold determination.[72] In recent years, courts have relied upon the type of inquiry developed by the Supreme Court in *Burton v. Wilmington Parking Authority,*[73] and later explicated in *Moose Lodge No. 107 v. Irvis.*[74] In *Burton* and *Moose Lodge,* the Court utilized a multidimensional approach in an attempt to discern whether there was a sufficiently close relationship between the state and the challenged conduct so that the activity could be fairly treated as that of the state.[75] The state action analysis employed by the Court in *Burton* was comprehensive and flexible; state action was viewed as a cumulation of a broad range of factors that *collectively* demonstrated the nature and extent of state involvement in the challenged activity. The *Burton* test was a process of "sifting facts and weighing circumstances,"[76] an identification of these indices and evaluation of the sufficiency of the nexus between the state and the activity under scrutiny, based upon the facts as presented in each case. Presumably, this nexus could be established through a single factor of sufficient magnitude. However, the test set forth in *Burton,* unlike that apparently applied in *Jackson,* clearly entailed a *cumulative analysis*—an assessment of the factors collectively, so as to attribute to nonobvious state involvement in private conduct its true significance.[77]

The Court in *Jackson,* however, has taken what would appear to be a markedly different tack. Rather than weighing and assessing

nonpayment. 95 S. Ct. at 455 n.11. Query, then, whether there would be any similarity in a situation where a secured party engaged in a constant practice of repossessing collateral from defaulting Black debtors by self-help means (pursuant to the security arrangement and/or Uniform Commercial Code § 9-503), but proceeded against all other debtors through judicial process by seeking a writ of replevin.

[70] E.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Evans v. Abney, 396 U.S. 435 (1970); Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948); The Civil Rights Cases, 109 U.S. 3 (1883).

[71] Comment, 48 N.Y.U.L. Rev. 493, 495 (1973).

[72] In Kotch v. Pilot Comm'rs, 330 U.S. 552 (1947), the Court recognized that "[t]he constitutional command for a state to afford 'equal protection of the laws' sets a goal not attainable by invention and application of a precise formula. This Court has never attempted that impossible task." Id. at 556.

[73] 365 U.S. 715 (1961). For a brief discussion of the case, see note 95 infra.

[74] 407 U.S. 163 (1972). For a brief discussion of the case, see note 27 supra.

[75] See *Jackson,* 95 S. Ct. at 453.

[76] 365 U.S. at 722.

[77] "As our . . . discussion in *Burton* made clear, the dispositive question in any state action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but whether the aggregate of all relevant factors compels a finding of state responsibility." *Jackson,* 95 S. Ct. at 458-59 (Douglas, J., dissenting).

the various factors cumulatively, the majority chose to apply the test in a *sequential* fashion.[78] As Justice Douglas argued in his dissenting opinion, "[i]t is not enough to examine *seriatim* each of the factors upon which the claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling."[79]

Justice Douglas's analysis of the majority's approach as being "fundamentally sequential rather than cumulative,"[80] is borne out by a reading of the majority opinion. First, it is noted that while the majority opinion cited to *Burton* in no fewer than three instances,[81] the specific quote referring to the need for "weighing and sifting" all of the evidence of state involvement is found only in Justice Douglas's dissent.[82] Second, the majority characterized Jackson's argument as a "*series* of contentions," concluding that "[w]e find none of them persuasive."[83] Third, and most revealing, was the ensuing discussion of each of these contentions. Although the Court stated that all of petitioner's arguments were, in fact, "taken together,"[84] a careful review of the Court's approach warrants the contrary conclusion. The majority engaged in an analysis that failed to recognize that the combined effect of the state's involvement in two or more of the areas identified by Jackson would have greater weight than if each were considered separately.[85] The only correlation between factors apparently considered by the Court involved the aspect of state regulation of the utility, which was viewed by the majority as an underlying condition of minor significance.[86] The interrelating effect of monopoly status with the other factors of state action, which was attributed great weight by both Justices Douglas and Marshall[87] was not even discussed in the majority opinion.

Another important facet of this new sufficiency test follows from the Court's treatment of the issue of state authorization and approval of Metropolitan's termination procedures.[88] The Court's traditional approach in this area has been to admit the presence of the state when it has lent its imprimatur to the challenged action in

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[78] Though the Court pays lip service to the need for assessing the totality of the state's involvement in this enterprise . . . its underlying analysis is fundamentally sequential rather than cumulative. In that perspective, what the Court does today is to make a significant departure from our previous treatment of state action issues. Id. at 459 (Douglas, J., dissenting).

[79] Id.

[80] Id.

[81] See id. at 453-54.

[82] Id. at 458 (Douglas, J., dissenting).

[83] Id. at 454 (emphasis added).

[84] Id. at 457.

[85] See id. at 457-60 (Douglas, J., dissenting).

[86] See id. at 453. The nexus text is discussed in the context of the aspect of state regulation, but the Court treats this factor differently than it treats Jackson's other contentions. See also note 29 & text at notes 29-33 supra.

[87] 95 S. Ct. at 458-59 (Douglas, J., dissenting); id. at 461-62 (Marshall, J., dissenting).

[88] Id. at 455-57.

a constitutionally cognizable fashion.[89] In developing a more rigid standard, the six-Justice majority in *Jackson* held that the state would need to have *ordered* Metropolitan to use summary procedures before state action could be found.[90] Analysis of the leading state action cases reveals the extent of the *Jackson* Court's departure;[91] these prior cases indicate that the requisite state involvement would be found to exist when an activity was "sanctioned in some way,"[92] "foster[ed] or encourage[d],"[93] or where the state placed "its power, property, and prestige behind"[94] the particular act. In *Burton v. Wilmington Parking Authority,* the Court went so far as to detect this imprimatur in the inaction of the state.[95] The majority in *Jackson,* however, has now concluded that nothing less than an affirmative command by the state will suffice to constitute state action;[96] and, it has done so relying almost exclusively upon its decision in *Public Utilities Commission v. Pollak.*[97] This result, in

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[89] See cases cited in id. at 462-63 n.2 (Marshall, J., dissenting). See generally Reitman v. Mulkey, 387 U.S. 369 (1967).

[90] 95 S. Ct. at 456-57. "[W]here the Commission has not put its own weight on the side of the proposed practice by ordering it, [approval of a tariff request] does not transmute a practice initiated by the utility and approved by the Commission into 'state action'." Id.

[91] Justice Marshall commented that "the suggestion that the state would have to 'put its own weight on the side of the proposed practice by ordering it' seems to me to mark a sharp departure from our previous state action cases." Id. at 462 (Marshall, J., dissenting). See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948). These cases are arguably distinguishable on the grounds that they dealt with Equal Protection rather than Due Process claims. However, on the basis of the Court's analysis in *Jackson,* it is not entirely clear that such a distinction is supportable. See notes 62-69 supra & accompanying text.

[92] The Civil Rights Cases, 109 U.S. 3, 17 (1883).

[93] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972).

[94] Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

[95] Id. The Eagle Coffee Shoppe, Inc., a privately owned restaurant, was located in a parking facility owned and operated by the State of Delaware. Appellant was refused food or drink by the restaurant, and brought action against the restaurant and the state agency, alleging the violation of rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment. Id. at 716. In view of all of the circumstances in the case, the Court held that the state was a joint participant in the operation of the restaurant, and that the restaurant's refusal to serve appellant was therefore a violation of the Equal Protection Clause. Id. at 725. In point of fact, however, it was the state's inaction in remedying the policy of racial discrimination that was at issue. "By its *inaction,* . . . the State . . . has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." Id. (emphasis added).

[96] 95 S. Ct. at 455-57. In fairness to the Court's position, it is noted that the opinion restates the observation of the district court "that the sole connection of the Commission with this regulation was Metropolitan's simple notice filing with the Commission and the lack of any Commission action to prohibit it." Id. at 456. See also id. at 455-56 n.13. But consider Justice Douglas's concerns that through "neglect or listless oversight," the Commission might have allowed the utility to perpetuate the injury. Id. at 459-60 (Douglas, J., dissenting).

[97] 343 U.S. 451 (1952). For a brief statement of the facts of the case, see note 28 supra. The Court distinguishes the circumstances involved in *Pollak* from those of *Jackson* by reasoning that the state did not place its *imprimatur* upon Metropolitan's termination practices. Whereas the Commission in *Pollak* investigated and held a hearing on the transit company's practices, and it had not only approved but encouraged the radio broadcasts, the state public utilities commission in *Jackson* took no such affirmative action, and therefore

itself, seems to manifest a clear departure from the Supreme Court's prior decisions.[98]

C. *Public-Private Choice: The Impetus to Act*

The fundamental importance of *Jackson* is that it reflects a new approach to the state action question, one that is characterized by a narrow type of inquiry and the application of a more rigid test to measure the sufficiency of state involvement. A consideration of the direction in which the Court is heading in its treatment of the public-private dichotomy embodied in the Fourteenth Amendment will hopefully assist in understanding the significance of the *Jackson* opinion. An analysis of *Jackson*, taken in conjunction with the earlier cases of *Evans v. Abney*,[99] and *Moose Lodge No. 107 v.*

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failed to "put its own weight on the side of the proposed practice by ordering it . . . ." 95 S. Ct. at 456-57. But see notes 37, 40 & text at note 41 supra.

[98] 95 S. Ct. at 462-63 & n.3 (Marshall, J., dissenting). Justice Marshall contends that none of the previous state action cases so much as suggest that such an extreme form of authorization or approval is required. Id. at 462-63 n.2. The language utilized in the cited cases would appear to support his argument.

[99] 396 U.S. 435 (1970). In Evans v. Newton, 382 U.S. 296 (1966), the precursor of *Abney*, the Court ruled that the charitable trust in the 1911 will of Senator Bacon, which created a park for the exclusive use of white people, violated the Equal Protection Clause of the Fourteenth Amendment. Although control of the park was left to a (private) Board of Managers, the Court reasoned that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." Id. at 299. The majority concluded that the public nature of the park required that it be subject to the Equal Protection Clause, and ruled that it "may not be operated for the public on a segregated basis . . . ." Id. at 302.

In Evans v. Abney, the Court was once again faced with the Georgia courts' treatment of the Bacon will. The state court had held that since the purpose of the testamentary trust was impossible of accomplishment, the trust instrument would have to fail and the property revert to testator's heirs. 396 U.S. at 439. The Supreme Court, in an opinion by Justice Black, held that the state courts did "no more than apply well-settled general principles of Georgia law to determine the meaning" of the will. Id. The claims of petitioners that this determination resulted in a denial of Equal Protection were rejected by the Court because, in its view, the benefits of the trust were being denied to everyone, "whites as well as Negroes." Id. at 446.

The basic effect of *Abney* was that the Supreme Court left standing a state court decision which invalidated the trust because of the impossibility of complying with testator's intent "that the park remain forever for the exclusive use of white people." Id. at 447. Although the Court in *Abney* preferred to view as the focal aspect of the case the fact that the impetus to discriminate originated with the private individual, *i.e.*, private as opposed to public choice, in terms of the Court's state action analysis, it is difficult to square *Abney* with Shelley v. Kraemer, 334 U.S. 1 (1948).

The question presented in *Shelley* was the constitutional permissability of state court enforcement of racially restrictive convenants under the Equal Protection Clause of the Fourteenth Amendment. Reasoning that that Amendment "erects no shield against merely private conduct, however discriminatory or wrongful," the Court sought to identify "such actions as may fairly be said to be that of the States." *Id.* at 13. The restrictive covenant involved in this case was an agreement between private individuals to prevent the sale or use of real property by members of a designated racial class of persons. The Court concluded:

> [T]he restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms,

Irvis,[100] indicates that the state action analysis will now focus upon a determination of the *origin* of the initiative to perform the challenged activity.[101] Where the initiative to act originates with the state, the resulting behavior will be subjected to the proscriptions of the Fourteenth Amendment, even if the actor is a private individual.[102] However, where the impetus to act derives from the exercise of private choice, the activity will be immune from the reach of the Fourteenth Amendment.[103]

If this public-private dichotomy is conceptualized as a horizontal line, with purely private acts located on its far left side, and purely public acts situated on the far right, plotting the position of any particular activity on this continuum will be primarily a function of the origin of the driving force behind the activity. This is the essence of the state action test employed in *Jackson*. It is neither particularly novel, nor does it establish a precise test of what will be treated as an act of the state under the Fourteenth Amendment. Rather than focusing solely upon the identity of the actor or the character of the resulting behavior, the test turns upon a determination of whether it is the state or a private party that exercises the *choice* to act.

Fundamentally, this current approach to the state action analysis reflects the development of a new doctrine of substantive due process[104]—an emerging trend of ad-hoc judicial policy-making

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it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.

Id. The Court held that judicial enforcement of the covenant would amount to state participation in the discriminatory acts of the private parties, or "state action" that was fully proscribable under the Fourteenth Amendment. Id. at 19. Compare Justice Brennan's dissent in *Abney*, 396 U.S. at 450-59, with the dissents of Justice Black and Harlan in *Newton*, 382 U.S. at 312-22.

[100] 407 U.S. 163 (1972). For a discussion of *Moose Lodge*, see note 27 supra.

[101] 95 S. Ct. at 455-56.

[102] E.g., Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Marsh v. Alabama, 326 U.S. 501 (1946).

[103] See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Evans v. Abney, 396 U.S. 435 (1970). Cf. Shelley v. Kraemer, 334 U.S. 1 (1948). In theory, at least, state action may be found even where the impetus to act is "private;" in *Moose Lodge* the Court reasoned: "Our holdings indicate that where the impetus for the discrimination is private, the state must have 'significantly involved itself with invidious discriminations,' Reitman v. Mulkey, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition." 407 U.S. at 173. In a practical sense, however, *Moose Lodge*, *Abney*, and *Jackson* indicate the extraordinary difficulty of connecting the state to a specific act or activity where the impetus to engage in that conduct is derived from an individual's private choice. The use of the term "private" in this context would seem inappropriate, inasmuch as the existence of a sufficient nexus with the state justifies treating the challenged activity as state action for Fourteenth Amendment purposes.

[104] The term "substantive due process" refers to a doctrine supporting judicial control over economic legislation—on both state and federal levels. It was a theory of "economic due process" that emerged and came to fruition in the courts during the ignominious heyday of laissez-faire economics in American society. Compare Munn v. Illinois, 94 U.S. 113 (1877), with Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), Lochner v. New York, 198 U.S. 45 (1905), and United States v. E.C. Knight Co., 156 U.S. 1 (1895). But see NLRB

that is based upon the subjective views of the Justices as to the proper plotting of "public" and "private" on this horizontal line. One of the principal results of the *Jackson* case is that the Court has moved the boundary of Fourteenth Amendment immunity afforded private conduct farther to the right of this continuum, requiring greater state involvement. Thus, the Court has extended this immunity to activities that could arguably be considered public in nature. The effect of this move is clear; it further limits the jurisdiction of the federal courts. In *Jackson*, the Court has removed the obligation of protecting certain interests of utility customers, arguably guaranteed by the United States Constitution, from the federal judiciary, and has left this responsibility to the Congress, state legislatures and state courts.

Viewing *Jackson* in the context of prior state action cases, it is arguable that the majority was executing a planned retreat from the broader implications of this historic doctrine. Of particular significance is the predictable movement of this Court toward at least a modification of the full scope of the doctrine of *Shelley v. Kraemer*.[105] *Shelley* stands for the rule that judicial enforcement of a racially discriminatory condition in a restrictive covenant constitutes state action. Quite notably, the impetus to discriminate in *Shelley* originated with private homeowners acting in their purely private capacities.[106] Query how long this doctrine is to be expected to withstand erosion in future state action cases.[107] It is not conceiv-

v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). See generally E. Barrett & P. Brutton, Constitutional Law: Cases and Materials, chs. 5, 10, at 258-326, 692-753 (4th ed. 1973).

The term "substantive due process" has been employed to refer to the Court's use of the Due Process Clause to give effect to "natural" or "fundamental" law in the cases. Consider Justice Holmes's famous dissent in Lochner v. New York, supra:

> This case is decided upon an economic theory which a large part of the country does not entertain. . . . I strongly believe that my agreement or disagreement [with that theory] has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . Some [state] laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and organic relation of the citizen to the State or of laissez faire.

198 U.S. at 75 (Holmes, J., dissenting). Consider also Rochin v. California, 342 U.S. 165 (1952), where the majority held that evidence obtained by police officers from petitioner by "stomach pumping," was taken in violation of the Due Process Clause of the Fourteenth Amendment.

> What the majority hold is that the Due Process Clause empowers this Court to nullify any state law if its application "shocks the conscience," offends "a sense of justice" or runs counter to the "decencies of civilized conduct." The majority emphasize that these statements do not refer to their own consciences or to their senses of justice and decency.

Id. at 175 (Black, J., concurring). Justice Black was particularly concerned that the "accordion-like qualities" of this application of the "evanescent standards of the majority's philosophy" would imperil the "individual liberty safeguards specifically enumerated in the Bill of Rights." Id. at 177.

[105] 334 U.S. 1 (1948). For a discussion of *Shelley*, see note 99 supra.

[106] Id. at 10-14.

[107] See, e.g., H. Friendly, The Dartmouth College Case and the Public-Private

able that the present majority would attempt to make inroads in the aspect of the case which holds that judicial action constitutes state action.[108] It is possible that *Shelley* will be limited nonetheless, if the Court continues to focus upon the origin of the impetus to act. Were the *Shelley* case to be presented after the decision in *Jackson*, it is at least arguable that the Court could find the nexus between the state and the challenged activity to be insufficient since the choice to discriminate was not only exercised by, but also originated with private individuals.[109]

III. CONCLUSION

The framers and the amenders of the United States Constitution apparently embodied in that document their fears of harsh and arbitrary governmental action on the one hand, and their desires to enhance and protect the societal values of pluralism, personal autonomy, and the maximization of opportunity for individual choice on the other.[110] The *Jackson* decision does not reflect similar considerations. If these fundamental values still inhere in the essential public-private dichotomy, it is difficult, as Justice Marshall notes, to ascertain or indeed, "to imagine any such interests that are furthered by protecting public utility companies from meeting constitutional standards that would apply if the companies were state-owned. The values of pluralism and diversity are simply not relevant when the private company is the only electric company in town."[111] Although the Court took great pains to stress the importance of the public-private dichotomy in *Jackson*,[112] notably absent from the opinion is any discussion of whether the disposition in the case actually preserved and promoted the values inherent in that essential distinction. Unless the Court can be expected to limit *Jackson* to its peculiar facts, or to limit its state action analysis to Due Process claims rather than to have it apply to Equal Protection litigation as well, it would not seem unreasonable to suggest that the private aspect of this essential dichotomy is being stretched beyond its intended and acceptable limits.[113]

Penumbra (1969); Wechsler, Towards Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959). But see Pollack, Racial Discrimination and Judicial Intergrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959).

[108] Compare Fuentes v. Shevin, 407 U.S. 67 (1971), and Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), with North Ga. Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719 (1975), and Mitchell v. W.T. Grant Co., 94 S. Ct. 1895 (1974). In these procedural due process cases, the Court has not deviated from the doctrine that judicial action is imputable to the state for Fourteenth Amendment Due Process purposes.

[109] See Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Evans v. Abney, 396 U.S. 435 (1970).

[110] See 95 S. Ct. at 464 (Marshall, J., dissenting).

[111] Id.

[112] Id. at 453.

[113] The Second Circuit in the recent case of Holodnak v. Avco Corp., Civil No.74-2381 (2nd Cir., filed Feb. 18, 1975)., viewed the *Jackson* decision as having an application limited

The Court should be loathe, as were the founders, to impose constitutional limitations upon relationships between private persons. That reluctance, however, should not be so extreme as to preclude the imposition of constitutional restrictions upon private entities which derive significant powers or aid from government, or which operate in a manner functionally indistinguishable from government itself.

It is submitted, therefore, that the Court in *Jackson* improperly granted immunity from the Fourteenth Amendment to Metropolitan, a monopolistic public utility that operated much like a government substitute in supplying electrical power to its service area.[114] Metropolitan engaged in a practice of summary terminations of service, and admittedly, the choice of whether or not to employ this practice in a particular situation was influenced not by public-interest concerns, but was rather motivated by a business-type desire to maximize profit.[115] If it can be assumed, arguendo, that Jackson had a constitutionally protectible entitlement to service,[116] and further, that private individuals are to be protected by the Fourteenth Amendment from the arbitrary exercise of powers by persons or entities functioning as government surrogates,[117] it is

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to its peculiar facts. The threshold question presented in *Avco,* a case that arose out of a labor dispute, was "whether the Government has become sufficiently entangled in the actions of a private party to warrant a requirement that such conduct conform to constitutional standards of behavior." Id. at 1832. As a defense contractor, Avco's plant, the land upon which it was built, as well as most of the "equipment used in the manufacturing process," were owned by the federal government. Id. at 1833-34. Additional circumstances indicated the extent of interdependence, cooperation and mutual benefit the existed between Avco and the federal government. The court of appeals read *Jackson* as having recognized the continuing viability of the principal set forth in Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), "that where the state goes beyond mere regulation of private conduct, and becomes in effect a 'partner' or 'joint venturer' in the enterprise, the inference of state responsibility for the proscribed conduct could be made." *Holodnak,* supra at 1836-37. The Court viewed the evidence and concluded that "[e]ven a cursory perusal of the facts in this case indicates that the government involvement in Avco's operations typified the 'symbiotic relationship', . . . which the Court failed to find in *Jackson.*" Id. Thus, the court in *Avco* distinguished the *Jackson* case on the basis of the partnership-joint venturer concept espoused in *Burton,* and found sufficient Government action to activate the Due Process Clause of the Fifth Amendment.

[114] See Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 665 (7th Cir. 1972) (dissenting opinion), cert. denied, 409 U.S. 1114 (1973). See also 95 S. Ct. at 462 (Marshall, J., dissenting).

[115] 95 S. Ct. at 456 n.15.

[116] The Court in *Jackson* never reached this issue because of its conclusion on the threshold question of state action. "We therefore have no occasion to decide whether petitioners claim to continued service was "property" for purposes of that Amendment, or whether "due process of law" would require a State taking similar action to accord petitioner the procedural rights for which she contends." Id. at 457. However, Justice Douglas would hold that "[e]lectrical service, being a necessity of life under the circumstances of this case, is an entitlement which under our decisions may not be taken without the requirements of procedural due process." Id. at 460 (Douglas, J., dissenting). Justice Marshall would apparently agree. Id. at 464-65 (Marshall, J., dissenting).

[117] This is the ultimate purpose of the Fourteenth Amendment. See 95 S. Ct. at 460 (Douglas, J., dissenting); id. at 464 (Marshall, J., dissenting). See generally Burke & Reber,

equally clear that this immunity granted to Metropolitan was in derogation of these rights.[118] It is thus suggested that the facts of this case belie the majority's conclusion that there was no state action present in the summary termination of electricity.

An important question raised by the *Jackson* case is the extent to which it will actually settle the state action issue in the public utilities area generally. Given the fundamental premise that any test for the presence of the state, for the purpose of the Fourteenth Amendment, must depend significantly upon an analysis of the particular facts in each case, and in view of the language employed in the *Jackson* opinion itself,[119] it would appear that there remains much room for arguing that even minor variations in the circumstances of another utility case could require a different result. Inasmuch as this sort of ad-hoc test tends to be both imprecise and unpredictable as well, confusion in the legal community is an inevitable result. Furthermore, the absence of even a general standard to measure state action exacerbates rather than ameliorates the caseload problem. The Court's application of a sliding scale in terms of the sufficiency requirement of the state involvement, which turns upon analysis of specific facts in specific situations, is a process that invites rather than discourages litigation when factual dissimilarities are rather minor. If one of the principal desires of the present majority of the Court can be identified as that of minimizing the role of the federal courts in this area of law, and for that matter in other areas of section 1983 litigation, the *Jackson* decision must be viewed as having added little substance to the development of a clear standard for state action analysis.

Jackson leaves itself open for a broad interpretation and expansive application, limiting the circumstances in which state action will be found. It is now incumbent upon the Court to indicate in subsequent decisions just how far it intended to go in furthering a more conservative trend in the Due Process-state action analysis. It is hoped that in future cases the Court will indicate that many of the predictions proffered in this note regarding the novel aspects of the *Jackson* opinion are without substance. Moreover, in the application of the principles embodied in *Jackson,* the Court should not prove itself so intractable that it will not reconsider the potentially adverse conse-

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State Action, Congressional Power and Creditors Rights: An Essay on the Fourteenth Amendment, I, 46 S. Cal. L. Rev. 1003 (1973); II, 47 S. Cal. L. Rev. 1 (1973).

[118] Consider that, upon occasion, public utilities have successfully excluded themselves from the reach of the antitrust laws by arguing that they perform a public function and that their monopolistic activity should be treated as state action. See 95 S. Ct. at 459-60 (Douglas, J., dissenting); Lucas v. Wisconsin Elec. Power Co., 466 F.2d 638, 662 (7th Cir. 1972) (dissenting opinion), cert. denied, 409 U.S. 1114 (1973); Note, 86 Harv. L. Rev. 1477, 1489 n.70 (1973). Cf. Isaacs v. Board of Trustees of Temple Univ., 43 U.S.L.W. 2241 (E.D. Pa. Nov. 11, 1974), wherein the Court would not give credence to the claim of the University that it was a "private" institution, since it had in the past attained benefits as a result of claiming that it was public in nature. Id.

[119] See note 47 supra.

quences of holding, as a general proposition, that public utilities are immune from the restrictions of the Fourteenth Amendment.[120]

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[120] Justice Marshall concluded: "Today the Court takes a major step in repudiating [a] line of authority and adopts a stance that is bound to lead to mischief when applied to problems beyond the narrow sphere of due process objections to utility terminations." 95 S. Ct. at 461 (Marshall, J., dissenting). Compare id. with Evans v. Newton, 382 U.S. 296, 315 (1966) (Harlan, J., dissenting), wherein he reasoned:

> More serious than the absence of any firm doctrinal support for this theory of state action are its potentialities for the future. . . . It substitutes for the comparatively clear and concrete tests of state action a catch-phrase approach as vague and amorphous as it is far-reaching. It dispenses with the sound and careful principles of past decisions in this realm. And it carries the seeds of transferring to federal authority vast areas of concern whose regulation has wisely been left by the constitution to the states.

Id. at 321-22. Although Justice Harlan feared the expansion of the federal courts into "private" action, and Justice Marshall was concerned with precisely the converse, a retraction of federal jurisdiction over "public action," both of these jurists expressed anxiety as to over-zealous application of a contemporary trend in the Court's state action analysis.